BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TIMOTHY D. CARTER Claimant V. **PRATT LOVE BOX COMPANY, LLC** Respondent AND **LOVE BOX COMPANY, LLC** Insurance Carrier	)))))))))	Docket No. 1,060,069

ORDER

Respondent and insurance carrier (respondent), by and through William Townsley, of Wichita, requested review of Administrative Law Judge Thomas Klein's August 21, 2014 Award. Kenton Wirth, of Wichita, appeared for claimant. The Board heard oral argument on December 9, 2014.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties agreed at oral argument that the Board may consult the AMA *Guides*[1] (hereafter *Guides*) in rendering a decision. The parties agreed that references in the record and briefs concerning an October 9, 2007 report from Dr. Truong actually concern a health history form claimant completed for Dr. Davis.

ISSUES

This case primarily concerns a low back injury claimant alleges occurred when he unhooked a trailer from a tractor on February 20, 2012.[2] The judge found claimant met with personal injury by accident arising out of and in the course of his employment and the accident was the prevailing factor in causing claimant's condition. The judge awarded claimant permanent partial disability benefits based on a 7.5% functional whole person impairment based upon a split of the ratings from two physicians. Claimant's right to pursue future medical treatment was left open upon proper application.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

[2] In his application for hearing, claimant alleged injuries to his back, right arm, legs and neck. Claimant testified his current injuries only concern his low back with pain going down his legs. (R.H. Trans. at 61).

Respondent requests the Award be reversed, arguing claimant failed to prove personal injury by accident arising out of and in the course of his employment while working for respondent on February 20, 2012. Respondent argues claimant failed to prove his alleged accident was the prevailing factor causing his injury, need for medical treatment, impairment or disability. Respondent argues that if claimant truly sustained an accidental work injury, he would have informed his employer and sought treatment under workers compensation insurance, rather than seeking and paying for treatment on his own.

Respondent also questions whether claimant's "standing up straight from a bent-forward position"[3] qualifies as a compensable work-related injury under the Kansas Workers Compensation Act. Respondent argues claimant's asserted accidental injury did not arise out of and in the course of his employment because it is either a neutral risk without any particular employment character, an activity of daily living or is due to an idiopathic cause.

While notice under K.S.A. 2011 Supp. 44-520 is not at issue and admitted by respondent, claimant argues he provided notice of his compensable work-related accidental injury to two supervisors on the date of accident. Claimant also requests the Award be modified, arguing he proved a 10% whole body functional impairment because his injury caused radicular symptoms in his legs.

The issues for the Board's review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment on February 20, 2012, including that the accident was the prevailing factor in causing claimant's injury, need for medical treatment, impairment and disability?

2. What is the nature and extent of claimant's disability?

3. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

While this matter primarily concerns a February 20, 2012 low back injury, respondent asserts claimant had a preexisting condition. In 1987, when claimant was 18 years old, he twisted his back while carrying a vacuum sweeper. Claimant testified such back pain involved his middle or upper back and such pain resolved a few weeks after he went to an emergency room and got muscle relaxers.

[3] Self-Insured Respondent's Brief on Appeal (filed Oct. 13, 2014) at 6.

Claimant saw Jeffrey Davis, M.D., on October 10, 2007. In an October 9, 2007 health history form, claimant listed chest pain/heartburn and severe back pain. The form and Dr. Davis' report do not state when claimant experienced his back pain or what part of his back was affected. Claimant's chief complaint to Dr. Davis concerned headaches. Dr. Davis assessed claimant as having sinus headaches and elevated blood pressure.

Claimant denied ongoing back pain or seeking a doctor's care for back pain from the time of his 1987 back strain until his February 20, 2012 accidental injury.

Claimant testified he felt fine before commencing work around 6:00 a.m. on February 20, 2012. Around 10:00 or 11:00 a.m., while unhooking a 53-foot trailer from his semi-tractor, claimant felt a sharp pain just above his belt line radiating down his legs. He denied prior similar symptoms. Claimant described the incident:

> I had back pain once I unhooked my tractor from my trailer. I came up and stood up straight, my back was just hurting pretty bad. Once I got back in my truck and pulled up, you know, I went up to the main lot there. Like I say, I couldn't explain how it happened or, you know, why it happened or whatever. But once I got done with that, my back was hurting.[4]

He further explained what happened as follows:

A. Just backed the trailer in and got out and proceeded to unhook my air lines and crank down my landing gear and pull my pin - - my fifth-wheel pin, and when I stood back up my back was hurting and hurting bad down through my legs.

Q. And where are these lines that you are referring to? Where are they located as to the truck?

A. Just right behind the cab of the tractor.

Q. And where is this pin that you referred to?

A. Right underneath the back - - right above the back tires. It's underneath the trailer.

Q. What kind of - - what kind of position did you have to put your back in in order to pull that pin and unhook these lines?

A. You have to bend over and then reach out and then pull back, and pull the pin. The lines, you just pull them off, and then the landing gears, you have got to bend over a little bit to kind of crank it down, or sometimes you have to use two hands, just depends on how hard the crank is.

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[4] P.H. Trans. at 10.

Q. Are you pulling the pin with one arm or two arms?

A. One arm. You can only get in there with one arm to pull the pin.

Q. And does that take any force to pull that pin?

A. Sometimes.[5]

Shortly thereafter, according to claimant, Julie Rodriguez, respondent's shipping and transportation manager, noticed him wincing from pain and asked him what was wrong. Claimant testified he told her his back was hurting after unhooking a trailer:

> A. What she asked me when my back was hurting, she said, what is wrong with you? I said, my back is hurting. She said - - I think she said, how did that happen? I said, I don't know. I just know once I got done unhooking my tractor from my trailer, my back was hurting. I can't explain how the incident happened or when it happened. I didn't feel a pop or a pull or anything like that. I just know when I stood up straight from doing that, my back was hurting.

Q. That is what you told her?

A. Yes.[6]

Ms. Rodriguez testified claimant told her on February 20, 2012, that his back was bothering him. She testified she asked him what was wrong and he said he did not know. Ms. Rodriguez testified she asked claimant if he had been hurt at work and he told her he did not know if he had been hurt at work. She testified claimant never told her he was hurt lowering landing gear or pulling the fifth wheel pin.

Claimant continued to work, but indicated his symptoms worsened throughout the day. Ms. Rodriguez testified she saw that claimant was still hurting later that day. She again asked him what happened and he again denied knowing why his back hurt.

Claimant testified Ms. Rodriguez was present for a conversation he had around noon on February 20, 2012, with Bobbie Claphan, respondent's dispatcher and his immediate supervisor. Claimant testified Ms. Claphan asked him what was wrong and he told her he was injured from unhooking his tractor from his trailer. Claimant testified he declined a request from Ms. Rodriguez that he go on another run or trip and that he told her the reason for avoiding the work was because his back was hurting. Ms. Rodriguez denied witnessing any such discussion between claimant and Ms. Claphan.

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[5] R.H. Trans. at 16-17; see also *id.* at 30-32 and P.H. Trans. at 10-11.

[6] P.H. Trans. at 33.

Ms. Claphan testified she did not have a conversation with claimant concerning a back injury from lowering landing gear on his trailer or any other work-related injury on February 20, 2012, but acknowledged being in the same room with claimant and Ms. Rodriguez when claimant complained to Ms. Rodriguez about back pain. Ms. Claphan also testified she was present when Ms. Rodriguez requested claimant go on another run or trip, but he declined because his back was not feeling well.

After work, claimant went home and soaked in a tub with Epsom salt, which failed to provide relief. Around 4:30 p.m., he called Ms. Rodriguez and told her he was going to the emergency room. Ms. Rodriguez acknowledged this conversation, but testified claimant said nothing about being hurt at work. Ms. Rodriguez denied claimant told her on February 20, 2012 that he had been hurt in a work-related accident. She testified that had claimant reported a work accident, she would have completed an accident report, obtained a urinalysis from claimant and provided him medical treatment.

Ms. Rodriguez prepared an undated time line noting that claimant, on February 20, 2012, told her he "wasn't sure" if he did "something at work" to hurt his back.[7] Ms. Rodriguez prepared another undated document stating claimant told her he had back pain on February 20, 2012, but he did not know what happened to him and did not know if he was injured at work.[8] Ms. Rodriguez never believed claimant's injury was work-related because he could not recall a specific instance of when his pain started.

Claimant denied telling Ms. Rodriguez he did not know what happened to his back. Claimant asserts he told her his back began hurting after unhooking a trailer. Claimant indicated he did not feel a pop or pull, he simply "stood up straight" after unhooking the trailer and his back was hurting.[9]

Claimant was seen at the Galichia Heart Hospital emergency room on February 20, 2012. He complained of low back pain which he rated as a 9.[10] The triage report indicated claimant's back pain started that day with "[n]o history of recent trauma."[11] The ER physician's report stated: "Onset- about 8 hours ago and it is still present . . . . Patient denies an injury."[12] Claimant had decreased low back range of motion. Greg Faimon, M.D., diagnosed claimant with acute pain in lower back, acute lumbar strain and hypertension. Claimant was prescribed Lortab and taken off work for one day.

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[7] *Id*., Resp. Ex. 2 at 2.

[8] *Id*., Resp. Ex. 2 at 1.

[9] *Id*. at 10, see also p. 33.

[10] All references to pain being rated are on a 0 to 10 scale, with 10 being the highest level of pain.

[11] Stipulation - Galichia Heart Hospital records (filed June 24, 2014) at 7.

[12] *Id*. at 4.

Claimant acknowledged he told the triage nurse that he did not have any history of recent trauma.[13] When asked if he denied telling Dr. Faimon there was no injury, claimant stated, "No. He asked me was I filing work comp, and I said no. At that time I didn't file work comp, so that's probably what was said, because it was definitely an injury to the back, and I didn't file work comp at that time."[14] Claimant denied knowing the "work comp procedure" and testified he did not want to get into trouble at work "for filing work comp."[15]

Claimant was seen the next day for his low back pain by Hai Truong, D.O., his primary care physician. Dr. Truong's records were not placed into evidence.[16] According to claimant, Dr. Truong prescribed medication and ordered an x-ray, which was negative. Dr. Truong ordered an MRI, took claimant off work and referred him to James Weimar, M.D., a neurosurgeon.

Claimant was seen by Dr. Weimar on February 27, 2012. Claimant complained of back pain and muscle spasms in his legs. A health history form had questions, "Is this a work related injury?" and "If yes, date of injury?" No responses were listed. Claimant signed the document. According to claimant, his wife filled out a patient history form stating he had no accident, but he had an injury at work on February 21, 2012 from "I Believe Riding in the truck & the way the sit bounce & cranking the landing gear."[17] Such form further states, "Always had back pain but would go away with walking however as of 2-21-12 got ~~back~~ BAD & Does not seem to be getting better."[18] Dr. Weimar noted claimant had "chronic back pain that has been exacerbated recently dating back roughly one week ago. This occurred when he was unlocking his trailer from his rig."[19]

After reviewing the MRI films, Dr. Weimar concluded there was no significant disc herniation, but there was a mild bulge at L4-5. Dr. Weimar indicated claimant may have suffered a back muscle strain, without any frank disc herniation or nerve root compression, and stated a facet cyst may be contributing to his back pain. Dr. Weimar diagnosed claimant with a herniated lumbar disc, facet syndrome and synovial cyst. Dr. Weimar recommended physical therapy, in addition to prescribing Flexeril and a Medrol Dosepak. According to claimant, Dr. Weimar did not believe he was a surgical candidate.

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[13] See R.H. Trans. at 46 and Stipulation - Galichia Heart Hospital records (filed June 24, 2014) at 7.

[14] R.H. Trans. at 47.

[15] *Id*. at 47.

[16] Dr. Truong's records were placed into evidence at the preliminary hearing, but were not thereafter stipulated or admitted into evidence.

[17] Stipulation - James Weimar, M.D./Abay Neuroscience Center (filed June 24, 2014) at 5. While claimant admitted always having back pain, he denied always having lower back pain. (R.H. Trans. at 48).

[18] Stipulation - James Weimar, M.D./Abay Neuroscience Center (filed June 24, 2014) at 5.

[19] *Id.* at 8.

For all of the treatment he received in February 2012, claimant used his health insurance and provided copayments to the medical providers.

Ms. Rodriguez testified the first time she learned claimant was alleging he was hurt at work was during a phone conversation she had with him on March 5, 2012. She testified she told claimant he had not told her anything about workers compensation during the whole time they had been discussing his back pain. The undated time line prepared by Ms. Rodriguez described such phone discussion:

> Tim called stating his back injury should have been work comp. I asked him "Why didn't he say that the injury happened at work?" He said "He told me that he did. I do not recall him stating the injury occurred at work." I asked "How does a cyst relate to a work related injury?" Tim said he had a bulging disk along with the cyst.[20]

On April 19, 2012, claimant returned to the Galichia Heart Hospital emergency room. Claimant complained of worsening back pain which radiated to his lower extremities with occasional radiculopathy. Claimant provided the following history: "Patient notes an injury. Patient denies a recent injury. . . . Similar symptoms previously: Several times. (Pt with injury at work in February and is trying to get work comp)."[21] The emergency room physician diagnosed claimant with lumbar radiculopathy and herniated disk. Claimant was prescribed Lortab and advised to limit lifting.

A preliminary hearing was held on April 26, 2012 before Administrative Law Judge Nelsonna Potts Barnes. Claimant sought medical treatment and payment of temporary total disability benefits. Claimant testified, as did Ms. Rodriguez and Ms. Claphan.

While awaiting the judge's ruling, on May 7, 2012, claimant was released to return to work without restrictions by Dr. Weimar. Thereafter, respondent sent claimant to Romeo Smith, M.D., to get a clearance to return to work. Dr. Smith examined claimant on May 18, 2012. In completing a DOT Medical Examination Report For Commercial Driver Fitness Determination, claimant reported having "chronic low back or neck pain."[22] Claimant also wrote that he had a disc problem in his back. Dr. Smith indicated claimant's back was normal with respect to alignment, palpation, range of motion and straight leg raise. Dr. Smith cleared claimant to return to work. Claimant returned to his regular job on May 20, 2012 without restrictions. Claimant testified he did what he had to do to pass the physical so he could get back to work and support his family.

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[20] *Id.*, Resp. Ex. 2 at 2.

[21] Stipulation - Galichia Heart Hospital records (filed June 24, 2014) at 10.

[22] Stipulation - Dr. Romeo Smith/Wichita Clinic (filed June 24, 2014) at 4.

Judge Barnes issued her preliminary hearing Order on September 21, 2012. Judge Barnes ruled the claim compensable and appointed George Fluter, M.D., as claimant's authorized treating physician. A single Board Member affirmed the Order.

On November 12, 2012, claimant was seen by Dr. Fluter, who is board certified in physical medicine and rehabilitation. Claimant complained of constant pain which he rated as a 9. Dr. Fluter noted claimant's everyday pain was worse with standing, walking, bending and twisting. Claimant admitted back pain in 1987 that resolved after getting muscle relaxers, with no subsequent back problems of significance. Dr. Fluter noted the February 20, 2012 Galichia Heart Hospital records indicated claimant denied an injury. Dr. Fluter also reviewed Dr. Truong's February 2012 records and Dr. Weimar's records.

Dr. Fluter diagnosed claimant with: (1) status post work-related injury, 02/20/12; (2) low back/bilateral leg pain; (3) lumbosacral strain/sprain; (4) probable lower extremity radiculitis; (5) lumbar discopathy; (6) probable sacroiliac joint dysfunction; and (7) probable trochanteric bursitis. Dr. Fluter opined claimant's injury was the prevailing factor for his need for medical treatment. Dr. Fluter recommended medications, physical therapy and interventional pain management procedures.

After receipt of Dr. Fluter's report, respondent filed a Motion for Reconsideration and To Discontinue Benefits on January 28, 2013, because of its concern that claimant's representation of his condition to Dr. Fluter differed compared to what was noted in Dr. Smith's records. Following a January 29, 2013 preliminary hearing, the judge appointed Paul Stein, M.D., a board certified neurosurgeon, to perform an independent medical examination for a causation opinion and treatment recommendations.

On April 8, 2013, Dr. Stein evaluated claimant. Claimant complained of low back pain radiating into his left thigh. He rated the pain from a 3 up to a 7 or 8. After reviewing the MRI films, Dr. Stein noted some facet arthritis at multiple levels which may have been causing claimant's discomfort. Dr. Stein was not convinced claimant had a left-sided disk protrusion at L4-5. He assessed claimant as having lower back pain with nonverifiable radicular features, etiology undetermined, with a differential diagnosis of lumbar strain/sprain and facet arthropathy. Dr. Stein recommended a series of left facet blocks at L3-4, L4-5 and L5-S1. If the blocks provided a good, albeit temporary, response, Dr. Stein recommended radiofrequency ablation of the facet nerves.

In addressing causation, Dr. Stein's report stated: "If the court accepts the statement of Mr. Carter as to the specific onset, there is a causal relationship and the work activity would be the prevailing factor. If one does not accept the statement of Mr. Carter, there is no relationship."[23] Dr. Stein further noted there were no records showing claimant had any significant preexisting low back symptomatology.

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[23] Stein Depo., Ex. 2 at 6.

After receipt of Dr. Stein's report, the judge issued a June 26, 2013 order appointing Dr. Stein as the new treating physician. On a referral from Dr. Stein, Dr. Milton Landers performed facet block injections on claimant in July 2013. According to claimant, the injections did not provide any significant relief. On August 8, 2013, Dr. Stein stated:

> Mr. Carter indicates that he did not get relief from the injections provided by Dr. Landers. I told him that I did not have anything further to offer in regard to treatment. The patient stated that he had an injection at Advanced Pain Management in June which helped for a while but I have no record of that in my record review. He did have three right L4-L5 transforaminal epidural injections by Dr. Jon Parks in January of this year, apparently without significant benefit. I do not have anything further to provide.[24]

Dr. Stein provided claimant with a Lortab prescription, but indicated any further prescriptions for pain medication would need to come from another physician.

On November 27, 2013, claimant returned to Dr. Fluter at his attorney's request. Claimant reported continued pain, which he rated as a 5. Dr. Fluter noted claimant had some benefit from a left-sided sacroiliac joint injection.

Dr. Fluter reiterated his prevailing factor opinion from his initial report. Using the *Guides*, Dr. Fluter assigned a 10% whole body functional impairment as follows:

- 5% whole body impairment based upon DRE Lumbosacral Category II;
- 1% for right-sided sacroiliac joint dysfunction;
- 1% for left-sided sacroiliac joint dysfunction; and
- 3% for clinical findings of trochanteric bursitis with abnormal gait.

Dr. Fluter indicated the *Guides* do not address impairment for sacroilitis, so he used physician judgment to assign impairment for such condition. Dr. Fluter also recommended ongoing medication management and indicated claimant may benefit from additional interventional pain management procedures.

On December 5, 2013, claimant returned to Galichia Heart Hospital emergency room complaining of an exacerbation of his back pain from increased work activity. He rated the pain as a 9. He complained of radiation of pain into his right buttock and leg. Claimant was diagnosed with sciatica. Claimant declined a pain injection and oral steroids, but was prescribed Percocet, Robaxin and Prednisone.

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[24] *Id*., Ex. 3.

At the April 16, 2014 regular hearing, claimant testified he continued to have lower back pain, which he rated as a 5. Claimant testified he no longer had excruciating daily pain and indicated the pain radiating down his legs had improved. Claimant testified an injection to his sacroiliac region was beneficial. He continued to work for respondent without restrictions. He testified Dr. Truong provides him prescription management.

Claimant denied other workers compensation accidents while working for respondent. Claimant testified about prior workers compensation injuries. In 1994, he sustained an eye injury. In 1998, he injured his shoulder working for Sysco and received an $11,000 settlement. In 2001, while working for Central Freight Lines, claimant injured his elbow and received a $3,500 settlement. For his injury with Sysco, claimant did not give the medical providers a copay for his treatment.[25]

Dr. Fluter testified on April 23, 2014. Dr. Fluter testified claimant's work accident caused a change in his body structure and his mechanism of injury was appropriate and competent to cause his injury. Dr. Fluter testified claimant's work accident was the prevailing factor in causing his medical condition. Dr. Fluter opined claimant will require continued prescription medications and monitoring in the future.

On cross-examination, Dr. Fluter acknowledged he did not have Dr. Truong's report dated October 2007,[26] nor Dr. Davis' note of October 10, 2007 regarding prior back complaints. Dr. Fluter admitted the history given by claimant to various health care providers immediately following his accident was different than the history he was provided. Dr. Fluter acknowledged that if claimant told Dr. Smith he "wasn't having any problems," such information would be inconsistent with him having continuing pain.[27]

Dr. Fluter also testified claimant had a normal nerve conduction study of his lower extremities and claimant had well-maintained vertebral height on radiological studies. Dr. Fluter noted claimant did not have frank radiculopathy, but radiculitis.

On May 20, 2014, Dr. Stein assigned claimant a 5% whole body functional impairment based upon Lumbosacral DRE Category II of the *Guides.*

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[25] P.H. Trans. at 32.

[26] The only October 9, 2007 document in the record is the health history form claimant completed for Dr. Davis. Dr. Truong and Dr. Davis may be in the same practice, as suggested by the parties, but there is no such record from Dr. Truong. It appears the document referenced during Dr. Fluter's deposition was the health history form insofar as it concerned a medical history of chest pain and severe back pain. (See also R.H. Trans. at 40-42 and P.H. Trans. at 34). The reports from both Dr. Fluter and Dr. Stein only reference Dr. Truong's records dated February 21 to February 28, 2012.

[27] Fluter Depo. at 25-26.

On June 19, 2014, Dr. Stein testified his examination of claimant revealed subjective findings of tenderness, restricted range of motion and some back pain with straight leg raising, but was otherwise normal, including claimant's lower extremity strength, reflexes and sensation. Straight leg raise testing did not elicit radicular symptoms. Dr. Stein diagnosed degenerative disc disease, possible facet irritation and possible nerve root irritation without true evidence of radiculopathy. Dr. Stein stated that if the claimant's testimony is believed – that he felt back pain after standing up after unhooking air lines, cranking down landing gear and pulling a fifth wheel pin – his work activity would be the prevailing factor with respect to causation. However, Dr. Stein noted if Ms. Rodriguez and the initial records from Galichia Heart Hospital were believed, there would not be a relationship between claimant's asserted accident and his injury.

In pertinent part, the judge's decision stated:

> The claimant's uncontroverted testimony is that he was unhooking his truck on February 20, 2012 when he felt pain in his back shooting down his legs. (Regular Hearing, p. 15,16) This action is clearly a work activity related to the claimant's employment and the court finds that the claimant met with personal injury by accident on that date, that arose out of, and in the course of, his employment.
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> . . . Dr. Fluter testified that in his opinion that the claimant had a work accident of February 20, 2012, and that accident was the prevailing factor in the claimant's need for treatment. (Fluter, pg. 10) Dr. Fluter found an impairment of function of 10% to the whole body which he attributed to this injury, that the accident was the prevailing cause of the impairment rating, and the claimant would need additional and ongoing medical care and treatment due to his injury. (Fluter, pg. 13)
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> . . . Dr. Stein was less clear on causation stating "if the Court accepts the statement of Mr. Carter as to the specific onset, that there was a causal relationship and the work activity would be considered the prevailing factor." (Stein p. 11) Dr. Stein clarified by stating that the question "depended on whether you looked only at objective evidence that had nothing to do with Mr. Carter's statements, or you took his statements made at a subsequent date as to the exact onset[.]" (Stein, p. 15) Dr. Stein assessed a 5% impairment to the body as a whole. (Stein p. 14)
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> The court finds that the claimant met with personal injury by accident that arose out of and in the course of his employment, and his injury was the prevailing factor in the claimant's condition. In doing so, the court relies on the opinion of Dr. Fluter and the testimony of the claimant. The court notes that the records that Dr. Stein relies on to question whether or not the claimant's work activity was the prevailing factor are not truly "objective" in a legal sense. Rather, they are hearsay medical records from claimant's former medical providers, only in evidence to the extent that the physicians who testified herein reviewed them gathering their histories. The court will not rely on these records to the exclusion of the claimant's testimony and Dr. Fluter's opinion.

> The court finds that Dr. Stein's and Dr. Fluter's ratings are of equal weight and averages them. The court notes that both physicians were authorized treaters in this case.
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> The court finds that the claimant suffered a 7.5% impairment to the body as a whole and orders an award on that basis.[28]

Respondent filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[29] The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[30]

K.S.A. 2011 Supp. 44-508 provides:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

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[28] ALJ Award at 3.

[29] K.S.A. 2011 Supp. 44-501b(b).

[30] K.S.A. 2011 Supp. 44-501b(c).

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

. . .

(u) “Functional impairment” means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

Bryant[31] states that whether an injury arises out of employment depends on what claimant was doing when injured:

> [T]he proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury?"
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> . . .
>
> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [sic] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement [–] bending, twisting, lifting, walking, or other body motions [–] but looks to the overall context of what the worker was doing – welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[32]

Bryant found accidental injuries due to reaching for a tool belt and bending to weld were compensable. Such injuries are not due to normal activities of day-to-day living.[33]

K.S.A. 2011 Supp. 44-510h(e) states, in part:

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement.

K.S.A. 44-519 states:

> [N]o report of any examination of any employee by a health care provider, as provided for in the workers compensation act . . . shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

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[31] *Bryant v. Midwest Staff Solutions, Inc.,* 292 Kan. 585, 257 P.3d 255 (2011).

[32] *Id.* at 595-96.

[33] *Id.* at 596.

K.S.A. 2011 Supp. 44-523(a) states:

> The director, administrative law judge or board shall not be bound by the technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.A.R. 51-3-5a states, in part:

> (a) Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement.

K.S.A. 2011 Supp. 44-551(i)(1) states, in part:

> [T]he board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2011 Supp. 44-555c(a) states, in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Board review of a judge's order is de novo on the record.[34] The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[35] The Board, on de novo review, makes its own factual findings.[36]

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[34] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[35] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[36] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[37] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[38]

ANALYSIS

1. Claimant sustained personal injury by accident arising out of and in the course of his employment. His accident was the prevailing factor causing his injury, medical condition, and resulting disability or impairment.

Some evidence calls into question if claimant was injured at work as alleged.

The February 20, 2012 Galichia Heart Hospital emergency room records noted claimant had "[n]o history of recent trauma" and he "denies an injury." Further, while claimant never had to use his own insurance or pay out-of-pocket for his prior workers compensation injury with Sysco, he did so when he went to Galichia Heart Hospital, Dr. Truong and Dr. Weimar.

There are attorney statements that Dr. Truong's initial report stated there was or was not a work injury.[39] Such statements are arguments, not evidence. Dr. Truong's February 2012 records are not in evidence. Dr. Stein testified that while he did not see documentation of a work injury in Dr. Truong's records, Dr. Truong's handwriting was "difficult to read" and did not make him view the case "one way or the other."[40]

Additionally, claimant and respondent witnesses differ as to what claimant said to his supervisors on the date of accident. Respondent witnesses deny claimant's contention that he told them on February 20, 2012 that he was hurt that day due to his work activities. However, Ms. Rodriguez also provided evidence that she did not recall claimant saying his injury was due to his work activities or that claimant simply told her he was not sure if he had been hurt due to work activities that day.

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[37] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[38] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

[39] See P.H. Trans. at 57; Stein Depo. at 18; R.H. Trans. at 47; Fluter Depo. at 21; Self-Insured Respondent's Brief on Appeal at 12.

[40] Stein Depo. at 26.

Ms. Rodriguez' written documentation noted claimant "didn't know" or "wasn't sure" if he had been hurt due to work activities does not rule out claimant having been hurt at work. Even if claimant was not certain on February 20 that he had been hurt while working, such doubt does not mean that claimant was not hurt while performing work that day.

Ms. Rodriguez' documentation of a March 5, 2012 discussion with claimant noting his contention that he already told her he had been hurt at work and her not remembering him previously telling her such information does not mean claimant did not tell her that he had been injured performing work or prove he was not hurt while performing work duties.

Claimant testified that Ms. Rodriguez was present for a conversation he had with Ms. Claphan about his asserted back injury. Ms. Rodriguez denied being present for any such discussion, but Ms. Claphan testified she and Ms. Rodriguez were in the same room when claimant was complaining to Ms. Rodriguez about back pain. The claimant testified he was speaking to Ms. Claphan, but Ms. Claphan testified claimant was talking to Ms. Rodriguez. Ms. Rodriguez testified she did not witness any such discussion when all three people were in a room together. The fact that Ms. Rodriguez and Ms. Claphan have different memories of what the claimant may have said on February 20, 2012 is problematic and shows that their memories of what occurred on the date of injury by accident may not be accurate.

On the other hand, claimant is consistent in his testimony that he told respondent he was hurt at work on February 20, 2012. Claimant also told Dr. Weimar he was injured at work when seen by such physician on February 27, 2012.

In considering the evidence, we repeat the mantra that appellate courts are ill suited to assessing witness credibility based on appearance and demeanor.[41] While the Board conducts de novo review, we nonetheless often opt to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.[42]

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[41] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[42] It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012); see also *Kotnour v. City of Overland Park*, 43 Kan. App. 2d 833, 837, 233 P.3d 299 (2010), *rev. denied* 293 Kan. 1107 (2012). "K.S.A. 2013 Supp. 77-527(d) requires the Board, when reviewing the ALJ's decision, to 'give due regard to the [ALJ's] opportunity to observe the witnesses and to determine the credibility of witnesses.' But considering and giving due regard do not vitiate the Board's authority to make its own findings of fact." *Hernandez v. Beef Products, Inc.*, No. 110,020, 2014 WL 1887662 (Kansas Court of Appeals unpublished opinion filed May 9, 2014).

Judge Klein had a first-hand opportunity to observe claimant's testimony and demeanor and concluded claimant sustained a compensable accidental injury. The judge explicitly indicated he was relying on claimant's testimony. Judge Nelsonna Potts Barnes also had the opportunity to witness testimony from claimant and his supervisors at the preliminary hearing. While it took Judge Barnes nearly five months to issue her preliminary hearing order, she impliedly found claimant credible by ruling in his favor. The Board agrees that claimant is a credible witness.

We further agree with Judge Klein that claimant sustained a work-related accidental injury arising out of and in the course of his employment. He was not simply or merely standing up from a bent position when injured. The context of claimant's activity was performance of a work-related task, not the result of normal activities of day-to-day living or a neutral risk. The risk of injury arose from an employment task. Both testifying physicians agreed claimant's mechanism of injury was competent to cause his injury.

Claimant's accidental injury was not the result of a personal risk. Claimant had a back strain when he was 18 in 1987. He reported severe back pain 20 years later in a health questionnaire on October 9, 2007, but was not treated for back symptoms, only for sinus-related headaches. A February 27, 2012 intake form for Dr. Weimar noted claimant always had back pain that would go away with walking. Dr. Stein was aware of at least the last two pieces of information and such knowledge did not alter his opinions. In fact, Dr. Stein noted such information was not significant.

Claimant's accidental injury was not the result of an idiopathic cause. "Doctors use the term idiopathic to refer to something for which the cause is unknown."[43] While claimant testified he was not sure how to explain how he was injured or that he did not know how he was hurt, he always stated he was injured due to standing up after being bent over, lowering the landing gear and pulling the pin. Claimant's statements, in full context, point to a work-related accidental injury.

Drs. Stein and Fluter opined claimant's accident was the prevailing factor in causing his injury, need for medical treatment, impairment and disability. The Board agrees. While Dr. Stein couched his opinion as being dependent on whether claimant's story was credible, the Board finds claimant credible.

Respondent, in addressing whether claimant proved an accidental injury arising out of and in the course of his employment, argues the judge erred in rejecting Dr. Stein's opinions based on the judge's belief that such physician's opinion was based on hearsay medical records. At oral argument, respondent asserted the judge's ruling constituted reversible error.

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[43] *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008) *aff'd* 291 Kan. 314, 241 P.3d 75 (2010).

Dr. Stein was free to rely on medical records, regardless of whether they are in evidence, to formulate his opinions. K.S.A. 44-519 excludes opinions not supported by a health care provider's testimony. "The workers compensation system has been well served by requiring the opinions of experts to be based on testimony subject to cross-examination, and if this is to be changed, we believe the legislature should do so and not this court."[44] While K.S.A. 44-523(a) disfavors "technical rules of evidence," K.S.A. 44-519 is a specific legislative mandate that must be followed.[45] K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians, so long as the testifying physician expresses his or her own opinion rather than the opinion of the absent physician:

> [K.S.A. 44-519] literally applies only when a party seeks to introduce a report or certificate of a physician or surgeon into evidence. In the present case, no report or certificate prepared by an absent, nontestifying physician or surgeon was introduced into evidence. Neither [doctor] attempted to 'bootleg in' the opinion of an absent, nontestifying doctor by merely reading from the other doctor's report. See, *e.g.*, *Mesecher v. Cropp*, 213 Kan. 695, 701-02, 518 P.2d 504 (1974). Although each doctor relied in part on the reports of the absent doctors in forming his opinion, each doctor, when testifying, expressed his own opinion and not that of the absent, nontestifying doctors."[46]

Some of the records Dr. Stein relied upon were not placed into evidence (such as February 2012 records from Dr. Truong), but they did not have to be. The Board concludes Dr. Stein's opinions were properly in evidence. Moreover, the Board's independent review of Dr. Stein's opinions confirms this case is compensable. Dr. Stein generally indicated claimant's case was compensable if claimant's mechanism of injury was to be believed, but not compensable if claimant was not hurt as alleged. The Board agrees with the judge's conclusion that claimant was injured as asserted.

2. Claimant sustained a 7.5% whole body impairment of function.

The Board agrees with the judge's conclusion regarding the nature and extent of claimant's disability. While claimant argues he is entitled to a 10% whole body impairment of function based on him having lumbar radiculopathy, the Board disagrees. Dr. Fluter did not rate claimant for radiculopathy. The *Guides* further indicate nonverifiable radiculopathy qualifies for a 5% whole person rating under DRE Lumbosacral Category II: Minor Impairment. Dr. Fluter confirmed claimant had nonverifiable radiculopathy.

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[44] *Roberts v. J. C. Penney Co.,* 263 Kan. 270, 282, 949 P.2d 613 (1997).

[45] *Id.* at 278.

[46] *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130-31, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

Respondent argues Dr. Fluter's opinion is less credible than Dr. Stein's opinion because Dr. Fluter did not review all of claimant's medical records. Respondent correctly points out that Dr. Fluter did not review the October 2007 records from Dr. Davis. The Board concludes Dr. Fluter's opinion is not diminished because he lacked the October 2007 records documenting prior back pain. The October 9, 2007 health history form and Dr. Davis' October 10, 2007 report were noted by Dr. Stein to be insignificant. Dr. Davis' report contains no mention of a low back examination and resulted in diagnoses not relevant to this matter.

Respondent argues Dr. Fluter did not review the Galichia Heart Hospital records, Dr. Truong's records[47] and Dr. Weimar's records. This was apparently based on Dr. Fluter's testimony that what claimant told him varied from what was noted by these other medical providers. The Board disagrees with respondent's argument. Dr. Fluter's initial report details that he reviewed all such records. Dr. Fluter's acknowledgment that different records contain different information is not tantamount to his failure to review the records.

It also appears that Dr. Fluter did not review Dr. Smith's May 18, 2012 DOT Medical Examination Report. The significance of such document is questionable, insofar as claimant told Dr. Smith he had chronic neck or back pain and a disc problem in his back. Claimant never told Dr. Smith he was symptom free.

3. Claimant is entitled to future medical treatment upon proper application.

Judge Klein awarded claimant future medical treatment upon proper application. The Board affirms this ruling.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board concludes: (1) claimant sustained personal injury by accident arising out of and in the course of his employment on February 20, 2012, and such accident was the prevailing factor in his injury, medical condition, impairment and disability; (2) he sustained a 7.5% whole body impairment of function; and (3) he is entitled to future medical treatment upon proper application.

AWARD

WHEREFORE, the Board affirms the August 21, 2014 Award to the extent it is consistent with this opinion.

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[47] While respondent argues Dr. Truong's report says claimant stated there was no work injury, such report is not in evidence. Even if it were, Dr. Stein testified he was unable to decipher Dr. Truong's report.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Thomas Klein